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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN A. CHRISTIAN, Appellant.	2 CA-CR 2009-0061 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072716

Honorable Gus Aragon, Judge
Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART AND REMANDED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant John Christian was convicted of sexual conduct with a minor under fifteen years of age. On appeal, he argues the trial court erred in (1) finding he had not established a prima facie case of discrimination when the state used all of its peremptory strikes against white males during jury selection; (2) admitting evidence of other acts; (3) permitting the state to impeach a witness through the statements of a third person; (4) admitting evidence of electronic mail (email) sent by the victim to her friends; (5) denying his motion for a mistrial when the investigating detective commented on Christian's invocation of his right to remain silent; and (6) permitting the state's expert to testify as a "cold expert" and to vouch for the victim's credibility. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Fourteen-year-old C. visited her grandfather, Christian, in Tucson from July 1, 2006, until August 5, 2006. One night in July, while C. and Christian were sitting together on an outdoor swing, Christian put his hand on C.'s leg above her knee and began rubbing her leg, gradually moving his hand higher. He rubbed C.'s crotch on the outside of her clothing and eventually put his hand inside her underwear and digitally penetrated her. After ten to fifteen minutes, he stopped, and C. went inside. The following day, C. sent

an email to two of her friends telling them what had happened, but directing them not to tell anyone. She returned home in August.

¶3 In November 2006, C. told her mother about the incident and her mother called the police. Christian eventually was charged with and convicted of sexual conduct with a minor under the age of fifteen. The trial court sentenced him to a mitigated prison term of thirteen years. This timely appeal followed.

Discussion

Batson Challenge

¶4 Christian first argues the trial court erred in denying his challenge, made pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to the state's exercise of its six peremptory strikes against white males. He contends the state's use of all of its peremptory strikes against individuals of his same race and gender was "certainly sufficient to establish a prima facie case of discrimination, as a matter of law." Although we decline to find that, as a matter of law, the use of all peremptory strikes on jurors of a particular protected group[1] is sufficient to establish a prima facie case of discrimination, we agree with Christian that the court erred in this case when it found he had not sustained this threshold burden of proof.

¶5 The venire panel consisted of twenty-two potential jurors—thirteen men and nine women. The racial makeup of the entire panel is unclear from the record.

[1]"The law does not permit the state to discriminatorily exclude any 'substantial and identifiable class of citizens' from the privilege and obligation of jury service." *State ex rel. Criminal Div. of Attorney Gen.'s Office v. Superior Court*, 157 Ariz. 541, 543, 760 P.2d 541, 543 (1988), *quoting Peters v. Kiff*, 407 U.S. 493, 503 (1972).

However, it is undisputed that the state exercised its six peremptory strikes against only white males. The defense struck three men and three women, leaving six women and four men on the jury. After both parties completed their peremptory strikes, Christian objected to the state's strikes on the ground that "all six strikes were white males. And the defendant is a white male." When the trial court asked the state to respond, the prosecutor stated, "[W]e had a large pool of white males to choose from, and for each of the jurors that I struck, there was a reason which is not a race-based reason, or a sex-based . . . reason." She then provided specific reasons for three of her six strikes before the court stopped her, concluding Christian had failed to establish a prima facie case of discrimination.

¶6 The following day the trial court permitted Christian to "supplement [the] record on the *Batson* issue." Counsel argued, "[O]nce I've made a prima faci[e] showing that all six peremptory strikes were of white males, then . . . a record must be established for the neutral reasons why the prosecution struck each one . . . . And yesterday . . . the prosecutor provided her reasoning for three, but did not provide reasoning for the remaining three." The court reaffirmed its earlier finding that "there ha[d] been no prima faci[e] showing. . . . [T]he defendant ha[d] not been deprived of his right to a jury of his peers. There are several white males on that jury." However, the court offered the prosecutor the opportunity to state her reasons for striking the other three potential jurors. The prosecutor provided no further explanation.

Prima Facie Case

¶7 "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race [or gender] from the jury venire on account of race [or gender]." *See Batson*, 476 U.S. at 86 (race); *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994) (gender). In *Batson*, the Supreme Court established a three-part process for analyzing claims of discrimination in jury selection. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). Initially, the party opposing the strike must establish a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. After a prima facie case has been established, the burden shifts to the striking party to provide a neutral explanation for the strike. *Id.* at 94. Finally, the trial court determines whether the proffered explanations are sufficient or merely pretextual. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). When considering a *Batson* issue, we defer to the trial court's factual findings unless they are clearly erroneous. *Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793. However, we review the court's legal determinations de novo. *Id*. The central question at issue here is whether Christian met his initial burden of establishing a prima facie case of discrimination.

¶8 The state argues that the record is insufficient for us to find the trial court erred in determining Christian had failed to make a prima facie case of discrimination. Because "[t]he record is silent as to the number of Caucasian males that were present at any step of the jury selection process," the state contends that any "conclusion that a

Batson violation occurred is sheer speculation." However, the state cites no authority that such a numerical analysis is absolutely necessary in evaluating *Batson* challenges, and relevant case law suggests otherwise. *See Berry v. State*, 728 So. 2d 568, ¶ 11 (Miss. 1999) ("[T]he *Batson* test does not require analysis of the racial composition of the jury and the venire."). Therefore, Christian is not precluded from making this argument on appeal despite his failure to provide the racial and gender composition of the entire jury venire.

¶9 Moreover, to the extent the state is arguing that Christian's claim necessarily fails because additional white males were selected for the jury, this argument, too, has been rejected. *See State v. Canez*, 202 Ariz. 133, ¶ 23, 42 P.3d 564, 577 (2002) ("[A]lthough 'the fact that the state accepted other Hispanic jurors on the venire is indicative of a nondiscriminatory motive,' it is 'not dispositive.'"), *quoting State v. Eagle*, 196 Ariz. 27, ¶ 12, 992 P.2d 1122, 1125 (App. 1998); *see also J.E.B.*, 511 U.S. at 142 n.13 ("[T]he possibility that members of [the particular protected group] will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.").

¶10 A defendant may establish a prima facie case of purposeful discrimination

> solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable [protected] group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's [group]. Second, the defendant is

> entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race [or gender].

Batson, 476 U.S. at 96 (citations omitted), *quoting Avery v. Georgia*, 345 U.S. 559, 562 (1953).

¶11 In *Canez*, our supreme court upheld a trial court's finding that the defendant had established a prima facie case of discrimination where the prosecutor had removed five of seven Hispanics from the jury pool and the defendant was Hispanic. 202 Ariz. 133, ¶¶ 16, 23, 42 P.3d at 576, 577. *See also Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, ¶ 76, 158 P.3d 877, 891 (App. 2007) (plaintiff made prima facie case of intentional discrimination where defendant's "first three strikes" against minority women). And in *State v. Bailey*, 160 Ariz. 277, 281, 772 P.2d 1130, 1134 (1989), the court found a prima facie case had been made where the prosecutor had used a peremptory strike to remove the sole African-American from the jury panel, without additional evidence. However, in *State v. Jordan*, 171 Ariz. 62, 65-66, 828 P.2d 786, 789-90 (App. 1992), this court concluded a prima facie case had not been established where the defendant was white and the prosecutor removed the sole Asian potential juror. In *Jordan*, we stated, "The standard required to constitute a prima facie showing of purposeful discrimination has experienced dramatic evolution since *Batson*. However,

some minimal *nexus* between the peremptory strike and the juror's race [is] required." *Id*.

¶12 Christian has established that nexus here. First, the excluded jurors were of the same race and gender as the defendant, unlike the potential jurors in *Jordan*. Additionally, the state exercised all of its strikes on members of this group. We recognize there were more men in the jury pool than women—thirteen men and nine women. However, the disparity is not so large that we could say the state's use of its strikes to exclude only white males lacks probative value. Likewise, the fact that other white males ultimately served on the jury is certainly relevant to our analysis. But, as noted above, we do not find it dispositive where the state used *all* of its peremptory strikes to remove white males and, given the finite number of its peremptory strikes, the state could not possibly have removed every white male from the jury. *See Eagle*, 196 Ariz. 27, ¶ 12, 992 P.2d at 1125.

¶13 Other jurisdictions that have considered *Batson* challenges on similar grounds have concluded they are sufficient to establish a prima facie case of discrimination. *See Green v. Travis*, 414 F.3d 288, 299 (2d Cir. 2005) (prima facie case established where prosecutor used "one hundred percent of her peremptory strikes to remove Black and Hispanic jurors"); *Harris v. Kuhlmann*, 346 F.3d 330, 346 (2d Cir. 2003) ("100% pattern of the use of peremptory strikes against black jurors" constitutes prima facie case); *McCain v. Gramley*, 96 F.3d 288, 292 (7th Cir. 1996) ("Where a party uses a significant number of its total strikes on members of a certain . . . group, one might

infer that the party was concerned about the . . . make-up of the jury and acted in a discriminatory fashion.") (citation omitted); *Berry*, 728 So. 2d 568, ¶ 11, ("Here, Berry met her burden of proving that the State exercised its peremptory challenges on the basis of race, because the State used all six of its peremptories against black members of the venire."). *See also Moran v. Clarke*, 443 F.3d 646, 651 (8th Cir. 2006) ("[T]he attempt to strike all black members of the venire and no one else raises an inference of discriminatory purpose."); *United States v. De Gross*, 960 F.2d 1433, 1442 (9th Cir. 1992) (prima facie case of gender discrimination established where party used seven of eight peremptories against males, at time of challenge ten men and two women seated in jury box, and one man remained in venire). We therefore conclude the trial court erred in finding Christian failed to establish a prima facie case of purposeful discrimination.

Remedy

¶14 Because Christian met his burden, the trial court should have required the state to proffer facially neutral explanations for all of its strikes. The court then could have evaluated these explanations to determine whether the state, in fact, had discriminated on the bases of race and gender. This did not occur. After Christian raised the *Batson* challenge, the state avowed it had a non-discriminatory intent as to all of its strikes, but only provided facially neutral explanations for striking three jurors. Because the court ultimately found "no merit to the *Batson* challenge," we presume it considered and accepted the state's proffered reasons and found no discriminatory intent as to those jurors. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) (trial court

presumed to know and follow law). Although Christian argued that one of the state's reasons was not supported by the record, we cannot say the court's conclusion as to these three jurors was an abuse of discretion. *See Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793.

¶15 The state did not provide reasons for striking the other three potential jurors, and its general avowal of nondiscriminatory intent is insufficient as a matter of law. *Batson*, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive."). Christian argues this error requires that we vacate his convictions and remand for a new trial. We disagree. Under these circumstances, a court generally "has the discretion to order a new trial only where it is 'demonstrably' true that 'the passage of time [has] impair[ed] the trial court's ability to make a reasoned determination of the prosecutor's state of mind when the jury was selected.'" *Harris*, 346 F.3d at 348, *quoting Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992). And,

> [o]rdinarily, factors to be considered in determining whether remand is appropriate are the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges.

People v. Williams, 93 Cal. Rptr. 2d 356, 361 (Ct. App. 2000). Christian has not argued, let alone persuaded this court, that a hearing to conduct the remaining *Batson* inquiry would not be feasible. Accordingly, we decline to order the drastic remedy of a new trial when one may not be necessary. We thus remand this matter to the trial court with

directions to conduct a hearing to determine whether the prosecutor's three remaining peremptory strikes were motivated by a discriminatory intent. If the court is unable to meaningfully assess whether the strikes were motivated by a discriminatory intent or it concludes that they were, it may enter such orders as it deems appropriate.

Other Act Evidence

¶16 Christian next contends the trial court abused its discretion in permitting the state to introduce "other act" evidence pursuant to Rule 404(b), Ariz. R. Evid., because it was irrelevant, unfairly prejudicial, and not proven by clear and convincing evidence before it was introduced.[2] During trial, C. testified that Christian had shown her part of a pornographic movie, discussed with her his sexual activities with his wife, and taken a picture of her in her bathing suit. Because he failed to challenge the admissibility of this evidence below, Christian has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). On appeal, Christian does not argue, let alone establish, that fundamental, prejudicial error occurred, and we find none sua sponte. We therefore find this argument waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008)

[2]Rule 404(b), Ariz. R. Evid., precludes the admission of other acts to prove the defendant acted in conformity with those acts. However, other acts may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). And, such evidence only becomes admissible once the court finds the state has proven the defendant committed the act by clear and convincing evidence, the evidence is offered for a proper purpose, and the probative value of the evidence is not outweighed by the potential of unfair prejudice. *State v. Terrazas*, 189 Ariz. 580, 582-83, 944 P.2d 1194, 1196-97 (1997).

(fundamental error argument waived on appeal absent argument); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error it discovers).

Hearsay and Confrontation Clause

¶17 Christian argues the trial court erred by permitting the state to impeach a witness's testimony through the testimony of another witness and admitting a copy of the email C. had sent to her friends after the offense had occurred. He contends this evidence was hearsay and violated his right to confront witnesses pursuant to the Sixth Amendment to the United States Constitution. Christian failed to object to this evidence below, and he has again failed to argue on appeal that fundamental error occurred. We thus find these arguments waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650.

Comment on Christian's Silence

¶18 Christian next contends the trial court abused its discretion in denying his motion for a mistrial after Detective Torralba commented on his Fifth Amendment right to remain silent. "Declaring a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that that is the only remedy to ensure justice is done." *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). Thus, a trial court has broad discretion in determining whether to grant a mistrial, and we will not reverse absent an abuse of that discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶19 During cross-examination, the following exchange occurred between defense counsel and Torralba:

> [COUNSEL]: Did you establish with [the witness] how she knew that Mr. Christian didn't discuss the e-mail with his wife?
>
> [DETECTIVE TORRALBA]: I asked her if she knew if Mr. Christian had discussed it with Mrs. Christian.
>
> [COUNSEL]: Did you ask her how she knew that information?
>
> [DETECTIVE TORRALBA]: . . . I couldn't tell you if I asked her exactly how, but we discussed whether or not she knew if he had discussed it with [his wife]. And she stated that he did not.
>
> [COUNSEL]: . . . [W]hen you're doing an investigation . . . part of your investigation is [that] you have to determine whether or not the person that you're talking to is in a position to know the things that they're telling you? . . . Do you agree?
>
> [DETECTIVE TORRALBA]: Yes, ma'am. I would have liked to have spoken with Mr. Christian about that, but I wasn't able to interview him.

At that point the trial court interrupted and asked the parties to approach the bench for a conference. The court expressed its concern that Torralba had commented on her inability to interview Christian and instructed the prosecutor to warn Torralba that it was improper for her to testify about Christian's decision to refuse to be interviewed by police. After Christian moved for a mistrial, the court excused the jury and, during a hearing on the issue, Torralba testified that she had responded to defense counsel's question in the manner she had because she believed defense counsel was asking her why

she was not "able to know for sure" whether Christian had spoken with his wife about the email the witness had seen on the office computer. When the court asked whether she "intend[ed] to infer to the jury that [Christian] had exercised his right to remain silent," she responded, "I know that he has that right, but from my understanding, . . . she was asking me specifically . . . about whether or not I could know . . . if Mr. Christian had spoken with his wife but I can't without speaking with him."

¶20 Defense counsel argued Torralba's comment was non-responsive to the question asked and had "[gone] into another direction" from what she had intended and had impermissibly told the jury Christian had refused to be interviewed by her. Counsel noted that "three, possibly four jurors [had] asked the question why Detective Torralba did not talk to the defendant, and I believe that those were triggered by the improper testimony." The trial court denied the motion, concluding Torralba had not intentionally placed Christian's invocation of his Fifth Amendment rights before the jury and that her interpretation of counsel's question was reasonable. The court also stated that it routinely receives questions from jurors concerning a defendant's refusal to speak with police officers and thus did not attribute the questions to Torralba's testimony.

¶21 "Due process demands that the state refrain from introducing testimony reflecting that a defendant had invoked his or her right to remain silent." *State v. Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d 1150, 1153 (App. 2002). "This rule 'rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'"

State v. Gilfillan, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000), *quoting Brecht v. Abhrahamson*, 507 U.S. 619, 628 (1993). "But testimony that falls short of disclosing a defendant's invocation of the right to remain silent does not run afoul of the Due Process Clause." *Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d at 1153.

¶22 Here, Torralba simply stated she had been unable to interview Christian. She did not say he had invoked his right to remain silent or otherwise suggest he had refused to speak with her. Her statement thus did not constitute a direct comment on Christian's invocation of his right to remain silent. *See id*. ¶¶ 4-5 (testimony that after receiving *Miranda*[3] warnings defendant had not made statements concerning owner of drug paraphernalia did not constitute comment on invocation of right to remain silent); *Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d at 1079 (no reversible error where "question and answer did not necessarily suggest . . . defendant was guilty because he had invoked his right to counsel during . . . questioning"). In any event, after Torralba made this comment, counsel immediately moved to a different topic, and neither party brought up the issue again. And, the jury later was instructed explicitly not to "conclude that [Christian wa]s likely to be guilty because [he] did not speak to the police" and that it must not let the fact he did not speak with police "affect [its] deliberations in any way." We presume the jury followed this instruction. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Thus, any error in Torralba's testimony was cured, and the court

[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

therefore did not abuse its discretion by denying Christian's motion for mistrial. *See Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d at 359.

Expert Testimony

¶23 Finally, Christian argues the trial court erred in permitting the state to introduce the testimony of Wendy Dutton as a "cold expert" and in "allowing her to testify to hearsay evidence regarding her experiences unsubstantiated by literature." He contends her testimony should have been precluded because "she provided no relevant information other than what a lay person on the jury would certainly already know" and that by quantifying how often children delay or fail to disclose abuse, she improperly bolstered C.'s credibility. He also asserts his "constitutional rights to due process and confrontation under the 6th and 14th Amendments" were violated by the portion of her testimony that was "based on hearsay 'experiences' . . . without any verifiable literature to use for support or review of her conclusions."

¶24 The state asserts that although Christian objected to parts of Dutton's testimony below, he did not do so on the grounds raised in his opening brief. It therefore suggests his appellate arguments are subject only to fundamental error review. In response, Christian asserts that, considering the record as a whole, his objection "was an all encompassing objection to her testimony on forensic interviewing which was effectively all her testimony."

¶25 Dutton initially testified about her experience as a forensic interviewer. The prosecutor then asked her to "define . . . what a forensic interview is," and defense

counsel objected "to any testimony on forensic interviewing in light of the fact that she did not conduct a forensic interview of C[.] and she ha[d] not reviewed a forensic interview of C[.]" The trial court overruled the objection, concluding it was "foundation for her expertise" in the field. Christian apparently challenged the relevance of Dutton's testimony concerning the process of forensic interviewing because her primary expertise was instead "in the field about the manner in which children may or may not [disclose] sexual abuse." And, contrary to Christian's argument, the bulk of Dutton's testimony focused on that topic, not forensic interviewing. We therefore cannot say Christian's objection below effectively challenged the general admissibility of Dutton's testimony. The state is correct that Christian did not object specifically to portions of Dutton's testimony based on the additional grounds he raises on appeal. We thus review these claims for fundamental error only.[4]

Common Knowledge of Jurors

¶26 Without any citation to the trial transcript of Dutton's testimony, Christian argues "Dutton testified about general characteristics that were absolutely common and that lay jurors would certainly understand without her . . . testimony." "[A]n expert witness may testify about the general characteristics and behavior of . . . victims if the information imparted is not likely to be within the knowledge of most lay persons." *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990). In *Tucker*, the court concluded "some" of an expert's testimony concerning how clinicians determine whether

[4]Our result would not differ had Christian properly raised and preserved these claims below.

children are telling the truth was improper because "the average person, in making common sense decisions about veracity, utilizes [the factors discussed] frequently." *Id.* at 347, 798 P.2d at 1356. However, "[w]hen the facts of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like the reactions of child victims of sexual abuse—expert testimony on the general behavioral characteristics of such victims should be admitted." *State v. Lujan*, 192 Ariz. 448, ¶ 12, 967 P.2d 123, 127 (1998).

¶27 Here, Dutton's testimony was focused on the dynamics of child victims' disclosure of abuse and false allegations of abuse, neither of which we consider to be within the common experience of jurors. *See State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) ("Certainly, the behavioral patterns of young victims of . . . child molestation fall into th[e] category" of subjects beyond the common experience of jurors.). It was thus properly admitted.

Bolstering C.'s Veracity

¶28 Christian argues Dutton testified about C.'s veracity by stating "it's more common for children to delay disclosure." He acknowledges this was not an "explicit[]" comment on C.'s veracity, but contends it "established any child's veracity and was similar to quantifying the information she was providing, which was improper," pursuant to *State v. Moran*, 151 Ariz. 378, 386, 728 P.2d 248, 256 (1986), and *Lindsey*, 149 Ariz. at 475, 720 P.2d at 76. Although we agree that "trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness,"

Dutton's testimony did not quantify C.'s credibility. *See Lindsey*, 149 Ariz. at 475, 720 P.2d at 76. She stated only that child sexual abuse victims more commonly delay their disclosure of the abuse. This does not lead, by itself, to an inference that C. was therefore telling the truth. It simply provides information that the jury could utilize in determining whether C.'s allegations, disclosed the day after the offense occurred and not repeated until months later, were credible. This is the proper function of expert testimony. *See id.* (expert's function "to provide testimony on subjects . . . beyond the common sense, experience, and education of the average juror"). The trial court's admission of this testimony was therefore not error, let alone fundamental error.

Demeanor Testimony

¶29 Christian also challenges the admissibility of Dutton's testimony concerning the demeanor of individuals making false allegations, asserting it was based upon her own opinion and not supported by "literature or agreements in the field." He acknowledges that experts usually may testify about facts they personally perceive. But, he contends, expert testimony is improper when the witness is not testifying about personally perceived facts because "there is no way whatsoever for the defense to cross-examine or confront [the witness] regarding what those past experiences were specifically and without potentially prejudicing his own case."

¶30 A juror asked whether Dutton "ha[d] any way of explaining the possible demeanor of teenage girls who give false accusations." Dutton responded that in her experience, "girls who report credible allegations of abuse show a wide range of

demeanor when they talk about them. . . . [C]omparing that with children . . . who make false allegations . . . —they tend to have a more hostile attitude, very matter-of-fact, [and] flat affect." She later clarified that there is "not much literature out there about the affect of girls who make false allegations"; she added that her testimony was based on her own experience as someone who conducts forensic interviews. Dutton later admitted on re-cross examination that she knew of no studies on the affect of children making false allegations, that her testimony on this issue was based "strictly" on forensic interviews she had conducted, and that another judge in Arizona had found her forensic interviews "to be below the professional standard of care."

¶31 Rule 602, Ariz. R. Evid., permits witnesses to testify to matters within their personal knowledge after sufficient foundation establishes that personal knowledge. And, Rule 703, Ariz. R. Evid., states that an expert may testify about an opinion that is based on inadmissible evidence. However, Christian has not provided, nor have we have found, legal authority supporting his contention that these rules only "contemplate[] situations where the expert actually is testifying about the specific facts of the case." The rules contain no such explicit language, and our supreme court has stated expert opinion evidence "based on . . . the observations and credibility of the witness . . . need only meet the requirements of relevancy and not be substantially more prejudicial than probative." *State v. Hummert*, 188 Ariz. 119, 125, 933 P.2d 1187, 1193 (1997).

¶32 Dutton was qualified as an expert witness and her demeanor-related testimony was based on her own experiences, which included conducting more than

6,000 forensic interviews. Her testimony concerning the demeanor of children making false allegations of abuse assisted the jury in discerning the credibility of C.'s allegation. Contrary to Christian's argument, this evidence was generally admissible. The trial court's conclusion it was thus relevant and more probative than prejudicial is supported by the record.

¶33 We similarly reject Christian's assertion that the admission of this evidence violated his confrontation rights because he could not cross-examine Dutton effectively about the specific examples that gave rise to her opinion. When an expert witness's opinion testimony is based on her own observations, it is the expert's "knowledge, experience, and integrity which . . . give the evidence weight," and because the expert is present and testifying, her "credentials, . . . experience, . . . motives and . . . integrity [may be] effectively probed and tested." *State v. Roscoe*, 145 Ariz. 212, 220, 700 P.2d 1312, 1320 (1984). Christian was able to cross-examine Dutton about the lack of published data to support her conclusion, her general credibility, and whether others found her methods sound. This is all the Confrontation Clause requires. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *State v. King*, 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994). Therefore, the trial court did not err in admitting this testimony.

Disposition

¶34 Because we conclude Christian established a prima facie case of discrimination pursuant to *Batson*, we remand this matter to the trial court for a hearing to determine whether the state had engaged in improper race or gender discrimination

during jury selection as to the three veniremen the state did not establish had been stricken for non-discriminatory reasons. If the court finds such discrimination occurred, the court may enter such orders as it deems appropriate. We find no error in all other respects.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge